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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DERRICK LEWIS DAVIS, Defendant and Appellant.	B215117 (Los Angeles County Super. Ct. No. NA079411)

APPEAL from a judgment of the Superior Court of Los Angeles County. John David Lord, Judge. Convictions affirmed; sentence vacated.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson, Lawrence M. Daniels and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Derrick Lewis Davis (appellant) of two counts of inflicting corporal injury on a cohabitant, Tracy B. (Tracy), (counts 1, 3;[1] Pen. Code, § 273.5, subd. (a)),[2] and one count of attempting to prevent a witness, Nickia V. (Nickia), from reporting a crime (count 2; § 136.1, subd. (b)(1)). As to counts 1 and 3, the jury found that appellant personally inflicted great bodily injury on Tracy under circumstances involving domestic violence (§ 12022.7, subd. (e)).

In a bifurcated proceeding, the trial court found that appellant was previously convicted of a serious felony, which qualified as a strike under the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and had served six prior prison terms. The trial court sentenced appellant to 42 years four months in state prison as follows: on count 1, the principal term, four years for the offense (upper term) doubled to eight years for the prior strike, plus five years (upper term) for the great bodily injury enhancement (§ 12022.7, subd. (e)), five years for the prior serious felony enhancement (§ 667, subd. (a)(1)), and six years for the prior prison term enhancements (§ 667.5, subd. (a)), for a total of 24 years; on count 2, eight months (one-third the middle term of two years) doubled to 16 months for the prior strike, plus five years for the prior serious felony enhancement, for a total of six years four months; on count 3, one year (one-third the middle term of three years) doubled to two years for the prior strike, plus five years (upper term) for the great bodily injury enhancement and five years for the prior serious felony enhancement, for a total of 12 years.

Appellant contends: (1) the trial court violated his Sixth Amendment right to confront adverse witnesses by admitting the preliminary hearing testimony of Tracy and Nickia at trial after finding that they were unavailable to testify; (2) the trial court penalized appellant for exercising his constitutional right to a jury trial; (3) the trial court

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[1] Count 1 pertained to a corporal injury inflicted by appellant on or between March 1, 2008 and July 10, 2008. Count 3 pertained to a corporal injury inflicted by appellant on or about July 1, 2008.

[2] All further statutory references are to Penal Code unless otherwise specified.

erred when it, and not the jury, determined the factors justifying the upper term on the great bodily injury enhancements on counts 1 and 3. We and the parties have raised several additional sentencing issues.

We affirm the convictions, but vacate the sentence and remand the matter for resentencing in accordance with this opinion.

BACKGROUND

Tracy testified to the following at the preliminary hearing, the transcript of which was read to the jury at trial: Tracy had two children with appellant and they lived together. On July 11, 2008, Tracy had a physical altercation with a woman who was possibly having an affair with appellant. After the altercation was over, Tracy returned home, and she and appellant began arguing. Tracy pushed appellant, which prompted appellant to push Tracy. Nickia, Tracy's daughter, entered the room just as this occurred. Nickia dialed 9-1-1 and then dropped the telephone. Appellant left the house. When police officers arrived, Tracy told them that she had been in a fight with appellant. Tracy denied telling Long Beach Police Department (LBPD) Detective Robin Hawkins that appellant had struck and kicked her on multiple occasions.

Nickia testified to the following at the preliminary hearing, the transcript of which was read to the jury at trial: On July 11, 2008, Nickia came home and saw that Tracy had a bloody nose and a swollen cheek. Nickia dialed 9-1-1. As Nickia was dialing 9-1-1, appellant asked Tracy "[a]re you going to let her call 9-1-1?" After Nickia dialed 9-1-1, she dropped the telephone behind the couch. When the emergency operator called back, appellant did not stop Nickia from retrieving the telephone. Nickia testified that she had seen appellant shove Tracy on some occasions, but never witnessed appellant hitting her. According to Nickia, Tracy had never complained of abuse by appellant.

LBPD Officer Christopher Castillo testified that on July 11, 2008, the 9-1-1 operator dispatched him to Tracy and appellant's home at approximately 9:35 p.m. Nickia answered the door and told him that her mother had been in a fight, but did not state with whom. As soon as Tracy saw Officer Castillo, she asked the officer to leave.

Officer Castillo saw that Tracy had two black eyes and blood on her shirt, and was bleeding from the face. Tracy told Officer Castillo that she was drunk and had fallen down. Tracy insisted that she did not need the officer's assistance and asked him to leave. Officer Castillo waited until the paramedics arrived before leaving.

LBPD Officer Ricardo Solorio testified that he arrived at appellant's home shortly after Officer Castillo. Nickia, who was standing in the front yard, approached him and told him that she was at a neighbor's house when she heard her baby brother crying. She left her neighbor's house, returned home, and saw Tracy crying in the bedroom with blood on her face. Nickia attempted to enter the bedroom to check on Tracy, but appellant pushed Nickia away and closed the bedroom door. Eventually, Nickia was able to enter the bedroom. Tracy told Nickia that appellant had hit her and pulled her hair. Nickia picked up the telephone to call the police, but appellant chased after her trying to take the telephone away from her. Nickia managed to call 9-1-1 and appellant left the house after learning that officers were on their way. According to Officer Solorio, when he asked Nickia if she had ever seen appellant hit Tracy in the past, Nickia stated that appellant would "hit[] [Tracy] all the time."[3]

The paramedics transported Tracy to the hospital, where Tracy told Officer Solorio that earlier that evening appellant had accused her of infidelity and struck her multiple times. According to Tracy, appellant's blows were so forceful that she temporarily lost consciousness. Tracy also told Officer Solorio that on a prior occasion, appellant kicked her in the head, causing her forehead to swell and her eyes to appear red and black. In spite of these revelations of abuse, Tracy told Officer Solorio she did not need his assistance and she did not want the police "in her business."

At the hospital, Tracy also spoke with Detective Hawkins, who testified that Tracy told her the following: in March 2008, appellant struck Tracy several times; in

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[3] LBPD Officer Jorge Marquez testified that he was present when Officer Solorio spoke with Nickia on the night of July 11, 2008. Officer Marquez confirmed the substance of Officer Solorio's testimony.

June 2008, appellant kicked Tracy in the head, which caused her head to swell; on the night of July 11, 2008, appellant struck her several times in the face, kicked her in the knees, and pulled her hair. During the interview with Detective Hawkins, Tracy attributed all of her injuries to appellant and did not mention a physical altercation with another woman.

Michelle Osho, Tracy's neighbor, was with her at the hospital. Osho told Officer Solorio that she often heard Tracy and appellant arguing, and that Tracy was reluctant to report appellant's violence because appellant had threatened to kill Tracy if she contacted the police.

Dr. Arlene Vernon, an emergency room physician, treated Tracy on the night of July 11, 2008. Dr. Vernon testified that when she first saw Tracy, she appeared distraught and was crying. Tracy told Dr. Vernon that appellant had struck her with his fists, twisted her wrists, and kicked her in the face, head, and abdomen. Tracy complained of hearing loss, pain in her left knee, a bloody nose, nasal pain, and a headache. Tracy also told Dr. Vernon that two to three weeks earlier, appellant had punched and kicked her head, which caused her forehead to swell and her eyes to become swollen and black. Tracy feared that if she told authorities about appellant's violence, someone would take her children away. Dr. Vernon further testified that a physical examination revealed multiple bruises on Tracy's body in various stages of healing. The doctor also observed finger mark contusions on Tracy's wrists that were consistent with someone gripping her wrists with great force. Additionally, Dr. Vernon observed black rings around Tracy's eyes and a ruptured eardrum, both of which indicated that Tracy had suffered a basilar skull fracture that likely resulted from being kicked in the head. Dr. Vernon testified that, in her opinion, Tracy's decision to stay with appellant despite ongoing abuse was consistent with battered woman's syndrome.

Appellant was arrested on August 19, 2008. The next day, Tracy told Detective Hawkins: "I'm not saying anything" and "Hey, this situation isn't that bad." Tracy attributed her injuries to a physical altercation with another woman. Detective Hawkins

also spoke with Nickia, who told her that on the night of July 11, 2008, she came home to find appellant pulling Tracy's hair. Tracy was bleeding and her face was swollen. Nickia picked up the telephone and tried to call the police. Appellant chased Nickia around the house in order to prevent her from calling the police. Once Nickia got through to 9-1-1, she dropped the telephone behind the couch so that appellant could not reach it. When appellant realized that police officers were on their way, he gathered his things and left the house. Nickia told Detective Hawkins that appellant and Tracy had physical altercations at least once a week.

LBPD Detective Bruce Roberson testified that on August 20, 2008, he visited Tracy at her home to present her with a photograph of appellant for identification purposes. She refused to identify appellant as the person in the photograph and then began to cry. She told Detective Roberson that appellant's anger and violence was recent.

An audio recording of Nickia's 9-1-1 call was played to the jury. During the call, Nickia informed the emergency operator that appellant had "hit on her momma." When the operator asked for additional details, Nickia stated that appellant and Tracy had been arguing, that appellant "started hitting" Tracy, and that appellant struck Tracy in the face, which caused one of Tracy's eyes to bleed. Nickia further told the operator that after appellant struck Tracy, appellant would not let Nickia "see" the telephone and instead tried to convince Nickia that Tracy had fallen down the stairs. At one point during the call, Nickia turned her attention away from the operator to say to appellant: "Can you get away from me, can you get away from me! I [am] tired [of] you hitting on my momma. Pull my hair." Nickia also provided the operator with a description of appellant, appellant's name, and the type of vehicle that appellant drove away in once he learned that police officers were en route.

Appellant did not testify at trial.

DISCUSSION

I. Alleged Sixth Amendment Violation

A. Appellant's Argument

Appellant argues that the trial court violated his Sixth Amendment right to confront witnesses against him when it admitted the preliminary hearing testimony of Tracy and Nickia. According to appellant, the prosecution did not use reasonable diligence in securing the presence of Tracy and Nickia for trial.

B. Summary of Proceedings Below

Before the preliminary hearing took place, the prosecutor, Detective Hawkins, and Tracy met to go over what would take place at the preliminary hearing. During this meeting, Tracy stated that she felt partially responsible for what took place on the night of July 11, 2008 and did not want to testify against appellant.

On August 28, 2008, Detective Hawkins personally served Tracy with a subpoena to testify at the preliminary hearing and instructed her to bring Nickia so that Nickia could also testify. On September 5, 2008, Tracy and Nickia appeared in court as ordered and testified at the preliminary hearing. Defense counsel cross-examined them. On September 19, 2008, the trial court ordered Tracy to return to court with Nickia on November 13, the trial date.

On November 13, 2008, neither Tracy nor Nickia appeared in court. The trial court continued the trial to December 2 and issued a body attachment for Tracy. After the body attachment was issued, Detective Hawkins attempted to contact Tracy by leaving her "numerous" telephone messages and visiting her home on at least five occasions. Although Tracy was not home on any of these occasions, Detective Hawkins did meet with Tracy's sister, Angela, and the detective left a subpoena with Angela to give to Tracy.

On December 2, 2008, Tracy and Nickia did not appear in court again. The trial court continued the matter to December 9, issued an arrest warrant for Tracy, and set bail. After learning that a warrant had been issued for her arrest, Tracy called Detective

Hawkins and indicated that she would cooperate and promised to appear in court the next day. But on December 3, 2008 Tracy did not appear in court. Detective Hawkins sent a patrol unit to Tracy's home to locate her. Though the patrol officer could hear the voices of young children inside and the sound of a television, no one answered the door.

On December 9, 2008, the trial court transferred the matter to another court and continued the trial to the next day.

On December 10, 2008, Tracy and Nickia appeared in court during the morning session as the parties argued pretrial motions. But during the lunch break, Tracy told the prosecution that she and Nickia would not testify at trial and promptly left. The trial court released the warrant for Tracy's arrest. The prosecution indicated that it was "mak[ing] every effort to have the jury see [Tracy and Nickia]." The prosecution stated that it was reluctant to arrest Tracy because she was caring for two children under the age of five, but confirmed that it would send an officer to contact Tracy and effectuate her presence in court the next day.

On December 11, 2008, Detective Hawkins went to Tracy's home to transport her to court, but no one was there. When Tracy and Nickia did not appear in court, the prosecution explained to the trial court that it was actively trying to arrest Tracy, but its efforts were unsuccessful so far. Jury selection commenced and continued through the next day. The court scheduled the next day of trial for December 15, 2008.

On the morning of December 15, 2008, Detective Hawkins again went to Tracy's home to bring her to court. No one answered the door. Detective Hawkins located Nickia at her school, but Nickia stated that she did not want to go to court and refused to go with the detective. Nickia also told the detective that she did not know of Tracy's whereabouts.

The trial proceeded without the presence of Tracy and Nickia. The prosecution moved to admit the preliminary hearing testimony of Tracy and Nickia. The trial court held a hearing on Tracy's and Nickia's unavailability. Detective Hawkins testified about the efforts she and her colleagues made to secure the presence of Tracy and Nickia, as

detailed above. At the conclusion of the hearing, the trial court found that Tracy and Nickia were unavailable to testify at trial and that "appropriate efforts were made to gain the actual presence of the witnesses[.]"

C. Relevant Authority

The Sixth Amendment of the federal Constitution guarantees a defendant the right to be confronted by witnesses against him. (*Crawford v. Washington* (2004) 541 U.S. 36, 42 (*Crawford*).) The prior testimony of an absent witness may be admitted only if the witness is unavailable and the testimony was given in a prior judicial proceeding against the same defendant, subject to cross-examination. (*Id*. at p. 54; *People v. Cromer* (2001) 24 Cal.4th 889, 897 (*Cromer*).)

To establish unavailability, the proponent of the evidence must show the declarant is absent from the hearing, and that the proponent has exercised good faith or reasonable diligence, but has been unable to procure the witness's attendance by the court's process. (*People v. Smith* (2003) 30 Cal.4th 581, 609–610 (*Smith*); *People v. Sanders* (1995) 11 Cal.4th 475, 522–523 (*Sanders*); Evid. Code, § 240 [A witness is unavailable if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance"].) "Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. [Citations.] California allows introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness. [Citation.]" (*Cromer, supra,* 24 Cal.4th at p. 892.)

"'What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. It has been said that the word "diligence" connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the court.'" (*Sanders, supra,* 11 Cal.4th at p. 523.)

"The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case . . . .' [Citation.] Also, the prosecution is not required, absent knowledge of a 'substantial risk that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing. [Citations.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) "That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) "'Where the record reveals . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts "unreasonable." [Citations.] The law requires only reasonable efforts, not prescient perfection.' [Citations.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

When the facts are undisputed, a reviewing court decides the question of due diligence independently. (*Smith*, *supra*, 30 Cal.4th at p. 610.) The admission of former testimony in violation of a defendant's constitutional confrontation rights is subject to the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), such that an otherwise valid conviction should not be set aside if the reviewing court may say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. (*People v. Geier* (2007) 41 Cal.4th 555, 608 (*Geier*).)

D. Analysis

We conclude that the prosecution used reasonable diligence in attempting to secure the presence of Tracy and Nickia for trial. Although Tracy expressed reluctance with assisting in the prosecution of appellant as early as appellant's arrest, Tracy and Nickia appeared at the preliminary hearing as ordered by the trial court. Given their appearance, the prosecution was justified in assuming that they would comply with the trial court's order to appear on the next court date. Once Tracy and Nickia failed to appear, the prosecution promptly requested that the trial court issue a body attachment for

Tracy. After the body attachment was issued, Detective Hawkins left numerous messages for Tracy and visited her home on at least five occasions. Additionally, Detective Hawkins met with Tracy's sister and left a subpoena for Tracy in her care.

The prosecution continued their efforts to secure the presence of Tracy and Nickia as the start of trial approached. Detective Hawkins visited Tracy's home again and sent a patrol car on a separate occasion to locate Tracy. On the morning of the hearing concerning Tracy and Nickia's unavailability, Detective Hawkins went to Tracy's home yet again to procure her attendance but could not locate her. Although Detective Hawkins managed to contact Nickia at her school, Nickia refused to go to court and stated that she did not know of Tracy's whereabouts. Given the totality of circumstances, the efforts by the prosecution to secure the attendance of Tracy and Nickia were persistent, substantial, and fulfilled the requirements for due diligence as set forth in the authorities cited above.

Appellant likens his case to *People v. Louis* (1986) 42 Cal.3d 969 (*Louis*) and *Cromer, supra,* 24 Cal.4th 889, both of which we find inapposite. In *Louis*, the only witness who could identify the defendant as the murderer was in custody on unrelated felony charges. The prosecution believed there was a "'real risk'" that the witness would not show up at trial, but nonetheless agreed to release the witness from custody to stay at a location unknown to the prosecution. (*Louis*, *supra*, at p. 992.) The only effort made by the prosecution to secure the witness's attendance at trial was to serve the witness with a subpoena, which the witness disregarded. (*Ibid*.) The prosecution made no other attempts to secure the witness's attendance. In *Cromer*, the prosecution had suspicions that a material witness had disappeared. Despite these suspicions, the prosecution waited approximately six months to search for the witness at her residence. (*Cromer*, *supra*, at p. 903.) By that time, the witness no longer lived there. (*Ibid*.) Unlike in *Louis*, the prosecution in this case took multiple steps beyond issuing a subpoena to secure Tracy's and Nickia's attendance at trial. And unlike in *Cromer*, the prosecution made immediate

attempts to contact them as soon as they disregarded the trial court's first order to appear in court.[4]

In sum we conclude the trial court properly deemed Tracy and Nickia unavailable to testify at trial. Accordingly, the admission of their preliminary hearing testimony, which was subject to cross-examination in a prior judicial proceeding, did not violate appellant's confrontation right under the Sixth Amendment. (*Crawford*, *supra*, 541 U.S. at p. 42.)

Even assuming that the trial court erred in admitting the preliminary hearing testimony of Tracy and Nickia, the error was harmless beyond a reasonable doubt. (*Geier*, *supra*, 41 Cal.4th at p. 608.) There was ample evidence from which the jury could conclude that appellant was guilty of the charged crimes independent of the preliminary hearing testimony provided by Tracy and Nickia.

During the 9-1-1 call, Nickia stated to the operator that appellant and Tracy had been arguing and that appellant struck Tracy in the eye, which caused her eye to bleed. Nickia further stated to the operator that after appellant struck Tracy, appellant would not let Nickia use the phone and instead tried to convince Nickia that Tracy had fallen down the stairs. At one point during the 9-1-1 call, Nickia was forced to turn her attention away from the operator to say to appellant: "Can you get away from me, can you get away from me!" Additionally, Nickia stated that appellant had left the scene. Nickia's statements to the 9-1-1 operator were admissible, despite Nickia's absence at trial, because they were not testimonial in nature. (*Crawford*, *supra*, 541 U.S. at p. 59; *Davis v. Washington* (2006) 547 U.S. 813, 822 ["[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the

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4 Additionally, appellant argues that the trial court should not have deemed Nickia "unavailable" because Detective Hawkins managed to contact Nickia at school. This argument is without merit. When Detective Hawkins spoke to Nickia, she refused to testify in court and denied knowledge of her mother's whereabouts. As there was no bench warrant for her arrest, the prosecution could not have arrested her in order to transport her to court.

primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"].)

Additionally, Dr. Vernon's physical examination of Tracy revealed multiple bruises on Tracy's body that were in various stages of healing, a condition consistent with a history of physical abuse. The doctor also observed finger mark contusions on Tracy's wrists that were consistent with someone gripping her wrists with great force. Additionally, Dr. Vernon observed black rings around Tracy's eyes and a ruptured eardrum, both of which indicated that Tracy had recently suffered a basilar skull fracture that likely resulted from being kicked in the head. Dr. Vernon further testified that Tracy's decision to stay with appellant despite ongoing abuse was consistent with battered woman's syndrome.

In sum, Nickia's statements to the 9-1-1 operator and Dr. Vernon's testimony regarding her physical evaluation of Tracy at the hospital, coupled with evidence that appellant fled the scene once police officers were en route, provided ample evidence that appellant was guilty of counts 1, 2 and 3.

Appellant argues that "if the testimonial statements of Tracy B. and [N.V.] had been excluded, there would have been nobody to describe what occurred during the two incidents." We disagree. There is no requirement of direct percipient witness testimony in the prosecution of a crime. In cases of domestic violence or crimes against children, the only percipient witnesses are often the victims themselves and they may not testify out of fear or reluctance. But this does not bar prosecution of the crime. The case must be built on other evidence and that is what occurred here.

We are satisfied that the trial court did not err by admitting the preliminary hearing testimony of Tracy and Nickia, and that even if there was error, it was harmless.

II. Alleged Penalty for Asserting Jury Trial Right

A. Appellant's Argument

Appellant argues that the trial court penalized him for exercising his right to a jury trial under the Sixth Amendment. Specifically, appellant argues "[t]he trial court stated it

would place appellant on probation with a suspended sentence of 32 years, four months, which appellant did not accept. Thus, despite knowing the facts of this case, the trial court was willing to grant probation before appellant elected to proceed to trial."

B. Summary of Proceedings Below

On December 11, 2008, before the start of voir dire, the prosecution stated that there was not a plea offer currently available to appellant. The prosecution noted that it had offered a sentence of seven years at arraignment, but the offer had been revoked. Appellant interjected and stated that the prosecution had offered him a sentence of four years and that he had rejected the offer.

The trial court stated that if appellant was willing to plead guilty to the charges and allegations against him, it would explore the possibility of placing appellant on probation for 10 years and suspending the maximum sentence, which the trial court roughly calculated at 32.4 years. The trial court noted that it would only explore the possibility of probation if appellant appeared receptive to the possibility of an open plea. The prosecution argued that the trial court was statutorily prohibited from granting appellant probation. The trial court stated that it would have to "look through the balance of statutes" to determine if appellant was eligible for probation before any further action could be taken.

On December 15, 2008, before opening statements, appellant asked the trial court whether it had given any more thought to the possibility of probation. The trial court clarified that it was simply in the "discussion phase" of considering whether probation was appropriate. The trial court explained that there were "two hurdle[s]" to surpass before it could extend a formal offer. First, it had to decide whether offering probation was "legally permissible" given the charges and allegations against appellant. Second, even if probation were available as an option, the trial court had to consider whether probation was appropriate under the circumstances. The trial court stated that the second hurdle was "very, very high" and that it would only consider making a formal offer after it "had a chance to hear all of the evidence . . . ." The trial court made clear that it was in

no position to make a formal offer of probation at that juncture because it had not looked at appellant's case in detail and had not read the transcript of the preliminary hearing.

Opening statements commenced after this exchange and the trial took place over the next several days. The trial court did not again raise the possibility of probation, nor did it make a formal offer of probation in exchange for an open plea.

C. Relevant Authority

A trial court violates a defendant's due process rights when it imposes a harsher sentence based on the defendant's election to exercise his or her constitutional right to a trial. (*In re Lewallen* (1979) 23 Cal.3d 274, 278.) To demonstrate that such a due process violation has occurred, "[t]here must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right." (*People v. Angus* (1980) 114 Cal.App.3d 973, 989–990; see, e.g., *In re Lewallen*, *supra*, at p. 282 [trial court responded to defense counsel's suggestion at sentencing that informal probation would suffice by saying: "I think I want to emphasize there's no reason in having the District Attorney attempt to negotiate matters if after the defendant refuses a negotiation he gets the same sentence as if he had accepted the negotiation. It is just a waste of everybody's time, and what's he got to lose"]; *In re Edy D.* (2004) 120 Cal.App.4th 1199, 1202 ["court's statement that if the minor inconvenienced witnesses by having them come to court for an adjudication hearing, the option of a disposition under Welfare and Institutions Code section 725, subdivision (a) would no longer be available to him"]; *People v. Morales* (1967) 252 Cal.App.2d 537, 542, fn. 4 [trial court said that defendants, who were already in prison, "have the same rights as anyone else . . . but I don't think it's fair for an inmate, or anyone else, to come to Court and demand a jury trial, demand the services of the public defender . . . when there really isn't any defense to this case, and there was no effort to put on a defense because there couldn't be [one]"].)

D. Analysis

There is nothing in the record to demonstrate that the trial court punished appellant for electing to have a jury trial. At no point during the proceedings did the trial court state, or even suggest, that appellant's decision to enter a plea of not guilty and elect a jury trial would be detrimental to him at sentencing. At the sentencing hearing, the court explained that it was imposing the high term on count 1 "based on the long and consistent history of criminal conduct by the defendant, as well as the position of trust and vulnerability of the victim[.]" The court further explained that it was imposing the high term on the great bodily injury enhancement based on the severity of the underlying injury itself and the vulnerability of the victim.[5] The trial court's reasons for selecting both of these upper terms had nothing to do with appellant's election to exercise his right to a jury trial.

Appellant concedes that "[t]he trial court did not expressly threaten appellant with a longer sentence if he waived his right to a jury trial." But he points to the disparity between what the court and the prosecution offered in exchange for a guilty plea, and the actual sentence the court imposed after the jury trial.

Appellant is not correct in asserting that the trial court "stated it would place appellant on probation with a suspended sentence of 32 years, four months, which appellant did not accept." The trial court made clear that its discussion of the open plea was *preliminary* and that it would not make a formal offer of probation *unless* it was certain that probation was statutorily permissible *and* appropriate given the totality of the evidence. At the time the court raised the possibility of probation, the court did not fully know the facts of the underlying case and explicitly stated that without this knowledge, it was not in a position to make a formal offer of probation. The facts surrounding the charged crimes were revealed during trial, and the trial court imposed the prison

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[5] As we explain in the next section, it was error for the trial court to select the upper term on the great bodily enhancement based on factors that were not submitted to the jury.

sentence. As no firm offer of probation was ever made, we find no merit to appellant's contention that he was penalized for rejecting an offer of probation and going to jail.

Furthermore, the disparity between what the prosecution offered at the arraignment and appellant's ultimate sentence after trial is not evidence that the trial court punished him for electing to have a jury trial. The prosecution's offer at arraignment was likely a reflection of how strong it believed its case was against appellant at that time. Nothing in the record suggests the trial court played any part in the prosecution's offer, or that the trial court held out the specter of a longer sentence if appellant elected to reject the prosecution's offer.

Appellant has failed to show that the trial court penalized him for exercising his right to a jury trial.

III. *Apprendi* Error

A. Appellant's Argument

Appellant contends that under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny, it was up to the jury, and not the trial court, to determine the aggravating factors used to justify the upper term for the great bodily injury enhancement (§12022.7, subdivision (e))[6] imposed on counts 1 and 3. The People agree that there was error, but argue that the error was harmless beyond a reasonable doubt.

B. Summary of Proceedings Below

During sentencing, the trial court imposed the upper term of five years for the great bodily injury allegations found true in counts 1 and 3. Initially, the trial court did not specify the reasons for its imposition of the upper term on the enhancement. But at the conclusion of the sentencing hearing the prosecution asked the following: "With the court's permission, is the court picking the aggravated term under the great bodily injury, due to the fact of the significance of the underlying injury itself, due to the head, due to

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6 Section 12022.7, subdivision (e) provides in relevant part: "Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years."

the extent of the injuries and the vulnerability of the victim?" The trial court replied "Yes."

C. Relevant Authority

In *Apprendi*, *supra*, 530 U.S. 466, 490, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington* (2004) 542 U.S. 296, 303, the Supreme Court explained that the "'statutory maximum'" referred to in *Apprendi* is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the Supreme Court applied *Apprendi* and *Blakely* to California's then existing determinate sentencing law (DSL) (former § 1170, subd. (b)), which provided "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Stats. 2004, ch. 747, § 3; *Cunningham*, *supra*, at p. 277.) The Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's DSL "violate[d] a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham*, *supra*, at p. 274.)

In response to *Cunningham*, the Legislature remedied the constitutional infirmities of California's DSL by amending section 1170 effective March 30, 2007. (Stats. 2007, ch. 3, § 2; see *People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2 (*Sandoval*).) The amended section 1170 now provides that: (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states. Section 1170 now states in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court . . . . The court

shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170, subd. (b).)

The Legislature did not amend section 1170. 1, which governs additional terms and enhancements, to comply with *Cunningham* until October 11, 2009. On January 22, 2009, the date appellant was sentenced, section 1170.1 read in relevant part: "If an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation, and state the reasons for its sentence choice, other than the middle term, on the record at the time of sentencing . . . ." (Former § 1170.1, subd. (d).)[7]

D. Analysis

At the time of appellant's sentencing, the statutory maximum for the great bodily injury enhancement under section 12022.7, subdivision (e) was the presumptive middle term of four years. Accordingly, the jury was required to find those factors used to justify the upper term on the enhancement. Thus, it was error for the trial court to impose the upper term of five years on the great bodily injury enhancement on counts 1 and 3 without additional findings by the jury. (*Cunningham*, *supra*, 549 U.S. at p. 277; *People v. Lincoln* (2007) 157 Cal.App.4th 196, 205.) The People agree that the trial court erred, but contend that the error was harmless. (*Sandoval*, *supra,* 41 Cal.4th at p. 839 ["[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless"].)

According to the People, it is beyond a reasonable doubt that the jury would have found beyond a reasonable doubt that Tracy was "vulnerable[.]" California Rules of

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[7] Section 1170.1, subdivision (d) now reads: "If an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interest of justice, and state the reasons for its sentence choice on the record at the time of sentencing."

Court, rule 4.421(a)(3)[8] lists as an aggravating factor that "[t]he victim was particularly vulnerable." We cannot say that the jury would have found this aggravating circumstance true beyond a reasonable doubt. (*Sandoval*, *supra*, 41 Cal.4th at p. 839.) While there was evidence that Tracy feared for the safety of her children and her own life if she reported appellant's abuse, there was also evidence that Tracy affirmatively rejected police assistance when it was offered to her. Tracy went so far as to testify under oath that appellant had not abused her. While a jury could have interpreted Tracy's reluctance to report appellant's abuse and enlist the help of authorities as evidence of a particularly fearful and battered victim, it could also have interpreted Tracy's reluctance as evidence that Tracy believed the abuse was not serious and could handle it on her own. While there was certainly evidence to sustain the findings that the jury did make, e.g., that appellant inflicted corporal injury and great bodily injury on Tracy, we cannot say that there was enough evidence to state beyond a reasonable doubt that the jury would have found her to be a particularly vulnerable victim.

We now turn the second aggravating factor used by the trial court to justify the upper term, specifically the significance and the extent of the injuries sustained by Tracy. Rule 4.421(a)(1) cites as an aggravating factor that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." The trial court clearly focused on the "great bodily harm" component, and the People on appeal argue that "it can be said with confidence that the jury would have found 'great bodily injury,'" had that factor been submitted to the jury. But that factor *was* submitted to the jury and found true by the jury, which served as the basis for imposing the great bodily enhancement. The trial court could not then use the presence of great bodily injury a second time to justify the upper term on an enhancement. Such a dual use of facts is impermissible. (Rule 4.420(c) ["[T]o comply with section 1170(b), a fact charged and found as an enhancement may be used as a

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8 All further rule references are to the California Rules of Court.

reason for imposing the upper term only if the court has discretion to strike the punishment . . . and does so"].)

Even assuming that the trial court was referring to the other aggravating factors listed in rule 4.421(a)(1), i.e., that the crime involved great violence, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness, we still cannot say beyond a reasonable doubt that the jury would have found these factors true beyond a reasonable doubt. We do not mean to minimize the injuries sustained by Tracy or the heinousness of the acts committed by appellant. But given the state of the record, it would be speculation to say the jury would have found any other aggravating factor true beyond a reasonable doubt.

Therefore, we vacate the sentence and remand the matter for resentencing on counts 1 and 3 in accordance with the guidelines of *Sandoval*. (*Sandoval*, *supra*, 41 Cal.4th at pp. 846–848.) "In *Sandoval*, *supra*, 41 Cal.4th at pages 845–857, our Supreme Court held it is constitutionally appropriate to apply the amended version of the DSL in all sentencing proceedings conducted after the effective date of the amendments, regardless of whether the offense was committed prior to the effective date of the amendments." (*People v. Jones* (2009) 178 Cal.App.4th 853, 866–867.) As noted above, section 1170.1, subdivision (d) now provides: "If an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interest of justice, and state the reasons for its sentence choice on the record at the time of sentencing." Thus, when this matter is remanded, the trial court shall have the discretion to select the lower, middle, or upper term for the great bodily injury enhancement under section 12022.7, subdivision (e), without submitting any mitigating or aggravating factors to the jury.

IV. Sentencing Errors Raised by Appellant and Respondent

Appellant and respondent have alleged other sentencing errors in addition to the *Apprendi* error discussed above. Although we are vacating the sentence and remanding

the matter for resentencing pursuant to *Sandoval*, we will decide the merits of these arguments in order to provide the trial court with additional guidance on resentencing.

(1) The trial court imposed a five-year prior serious felony enhancement (§ 667, subd. (a))[9] and a one-year prior prison term enhancement (§ 667.5, subd. (b))[10] for the same prior conviction of discharging a firearm at an inhabited dwelling, i.e., conviction No. BA136832. Appellant contends the one-year prior prison term enhancement should be stricken. The People agree. We agree as well. (*People v. Jones* (1993) 5 Cal.4th 1142, 1151–1153 [enhancements under §§ 667, subd. (a) & 667.5, subd. (b) cannot be imposed for the same prior conviction; proper remedy is to strike the shorter enhancement].) Accordingly, on remand, the trial courts should strike the one-year prior prison term enhancement (§ 667.5, subd. (b)) associated with conviction No. BA136832.

(2) The trial court imposed two 1-year prior prison term enhancements based on two prior convictions, i.e., conviction Nos. BA136832 and YA029734. The sentences imposed as a result of these convictions, however, were ordered to run concurrently, and thus according to appellant, one of the two 1-year prior prison term enhancements should

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9 Section 667, subdivision (a)(1) provides in relevant part: "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." Because section 667, subdivision (a)(1) is subject to extensive discussion in the next section, we will hereinafter refer to it as "section 667(a)(1)" for brevity.

10 Section 667.5, subdivision (b) provides in relevant part: "[W]here the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction."

be stricken, because they were not "separate prison term[s]." (§ 667.5, subd. (b).) We need not reach the merits of appellant's argument because, for the reasons stated in paragraph (1) of this section, we are striking the one-year prior prison term enhancement associated with conviction No. BA136832. Thus, what remains is a proper one-year enhancement associated with conviction No. YA029734.

(3) On count 3, a subordinate count, the trial court imposed the upper term of five years for the great bodily injury enhancement (§ 12022.7, subd. (e)). Appellant argues that the trial should have reduced the enhancement to 16 months, i.e., one-third the middle term of four years. The People argue that the trial court should have reduced the enhancement to 20 months, i.e., one-third the upper term of five years.

Section 1170.1, subdivision (a) provides in relevant part: "The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, *and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses*." (Italics added.) Under the plain language of section 1107.1, subdivision (a), a defendant is subject to one-third of *any* enhancement term, whether lower, middle, or upper, imposed by the trial court on the subordinate count. (See *People v. Hill* (2004) 119 Cal.App.4th 85, 91 [trial court imposed one-third of upper term on gun use enhancement associated with subordinate count; on appeal, defendant argued that section 1170.1 required imposition of one-third the middle term on the enhancement; court rejected argument and held that under plain language of section 1170.1, "the trial court retains the discretion to use any one of the available terms in calculating the sentence for a subordinate enhancement"]; see also *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1302 [same analysis on prior version of section 1170.1].) Thus, the trial court could impose one-third the middle term of any enhancement associated with a subordinate count.

Upon remand, the trial court shall have the discretion to select the lower, middle, or upper term for the great bodily enhancement under section 12022.7, subdivision (e) on

counts 1 and 3, and impose one-third of whichever term it selects as the enhancement on the subordinate term.

(4) In a footnote in respondent's brief, the People argue that the trial court erred in calculating the sentence on count 2, eight months (one-third the midterm of two years) doubled to 16 months for the prior strike. The People contend that because the middle term for attempting to prevent a witness from reporting a crime (§ 136.1, subd. (b)(1)) is four years, the trial court should have sentenced appellant to 32 months, i.e., 16 months (one-third the middle term of four years) doubled to 32 months for the prior strike. We disagree. A violation of section 136.1, subdivision (b)(1), carries a punishment of county jail for not more than one year (if punished as a misdemeanor) or 16 months, two, or three years in state prison (if punished as a felony). Here, the offense was a felony and the court correctly imposed a 16-month sentence for the underlying offense (1/3 x 24 months x 2=16 months).

V. Multiple Imposition of Enhancements Under Section 667(a)(1)

The jury convicted appellant of two counts of inflicting corporal injury on a cohabitant (with personal infliction of great bodily injury) and one count of attempting to prevent a witness from reporting a crime. Both offenses are serious felonies. (§ 1192.7, subd. (c)(8) & (37).) The trial court found that appellant had suffered one prior serious felony conviction.[11] At sentencing, the trial court imposed separate five-year enhancements on counts 1, 2, and 3 based on section 667, subdivision (a)(1) which provides: "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

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[11] The prior conviction was for discharging a firearm at an inhabited dwelling (§ 246), which qualifies a "'serious felony'" under section 1192.7, subdivision (c)(33).

We requested additional briefing on the following issue, which was not raised by either party: "Did the trial court err by imposing a separate five-year sentence enhancement pursuant to Penal Code section 667, subdivision (a) on each count of which appellant was convicted, or should the trial court have imposed only one 5-year enhancement to the aggregate sentence?" (See *People v. Tassell* (1984) 36 Cal.3d 77, 90 (*Tassell*).)[12]

In response to the request, appellant filed a letter brief in which he argued that under the Supreme Court's holding in *Tassell*, *supra*, 36 Cal.3d 77, the trial court should have imposed one 5-year enhancement to his aggregate sentence. The People responded and argued that under *People v. Misa* (2006) 140 Cal.App.4th 837 (*Misa*), the trial court properly imposed separate five-year enhancements on each count of which appellant was convicted.

In *Tassell*, the defendant was convicted of kidnapping, rape, and forcible oral copulation. (*Tassell*, *supra*, 36 Cal.3d at p. 80.) The trial court found that Tassell had served a prior prison term out-of-state and had suffered a prior rape conviction in California. The trial court stayed punishment on the kidnapping count and sentenced Tassell to a determinate term of 28 years for the remaining two counts, which included a separate one-year enhancement on each count for the prior prison term (§ 667.5, subd. (b)) and a separate five-year enhancement on each count for the prior rape conviction (§ 667.6, subd (a)).[13] The question presented on appeal was whether the trial

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12 *People v. Tassell* was overruled on an unrelated point in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.

13 At the time, section 667.6, subdivision (a) provided: "Any person who is found guilty of violating subdivision (2) or (3) of Section 261 [rape], Section 264.1 [rape or penetration by foreign object in concert], subdivision (b) of Section 288 [lewd or lascivious acts with child under age 14], of section 289 [penetration by foreign object], or of committing sodomy or oral copulation in violation of section 286 or 288a by force, violence, duress, menace or threat of great bodily harm who has been convicted previously of any such offense shall receive a five-year enhancement for each such prior conviction provided that no enhancement shall be imposed under this subdivision for any

erred by using the prior prison term and prior rape conviction twice, i.e., to impose enhancements on both the rape and oral copulation counts.

The Supreme Court began its analysis by explaining that section 1170.1, the statute under which Tassell's determinate sentence was calculated, "refers to two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense." (*Tassell, supra*, 36 Cal.3d at p. 90.) The Supreme Court explained that "[e]nhancements for prior convictions . . . are of the first sort." (*Ibid.*) Enhancements that "arise from the circumstances of the crime," typified by firearm use or great bodily injury infliction, are of the "second kind[.]" (*Ibid.*; see also *People v. Coronado* (1995) 12 Cal.4th 145, 156 [affirming *Tassell's* distinction between enhancements that go to the nature of the offender and nature of the offense].)

The Supreme Court explained that under section 1170.1, the two categories of enhancements operate differently on a defendant's sentence: "Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*Tassell, supra,* 36 Cal.3d at p. 90.) In other words, "enhancements for prior convictions do not attach to particular counts but instead are added just once as the final step in computing the total sentence."**14** (*Ibid.*) Because the enhancements applicable to Tassell's sentence were for prior convictions

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conviction occurring prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction."

14 The Supreme Court focused in particular on subdivision (a) of section 1170.1, which at the time provided that: "[W]hen any person is convicted of two or more felonies . . . the aggregate term of imprisonment for all such convictions shall be the sum of the principal term, the subordinate term and any additional term imposed pursuant to Section 667.5, 667.6, or 12022.1." Section 1170.1, subdivision (a) now provides in similar fashion that: "When any person is convicted of two or more felonies . . . the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1."

that went to his status as a recidivist offender, the Supreme Court held that the trial court erred by applying the enhancements twice, once to the rape count and once to the forcible oral copulation count. (*Id*. at pp. 92–93.) Instead, the trial court should have applied the enhancements only once to the aggregate term of Tassell's sentence. (*Ibid*.)

In *People v. Williams* (2004) 34 Cal.4th 397 (*Williams*), the Supreme Court considered the application of its holding in *Tassell* to a multiple indeterminate sentence imposed on a third striker under the Three Strikes Law. In *Williams*, a jury convicted the defendant of rape, forcible oral copulation, and forcible sodomy in one case (the rape case), and residential burglary in another case (the burglary case). The trial court found that prior to the rape and burglary cases, the defendant had suffered two prior felony convictions that qualified as serious felonies and prior strikes under the Three Strikes law. (*Williams*, *supra*, at p. 400.) The trial court sentenced the defendant on both cases at the same hearing. On the rape case, the trial court imposed three concurrent sentences of 25 years to life, plus a determinate term of 10 years under section 667(a)(1) for the two prior serious felonies. On the burglary case, the trial court sentenced the defendant to 25 years to life with an additional 10 years under section 667(a)(1) for the two prior serious felonies. Thus, the total sentence consisted of a determinate term of 20 years to be followed by two consecutive indeterminate life sentences, each having a minimum term of 25 years. (*Williams*, *supra*, at p. 400.) On appeal, the defendant contended that under *Tassell*, the trial court should have imposed only one 10-year enhancement to his aggregate sentence. (*Williams*, *supra*, at p. 401.)

The Supreme Court began its analysis in *Williams* by affirming its holding in *Tassell*: "[W]hen imposing a *determinate* sentence on a recidivist offender convicted of multiple offenses, a trial court is to impose an enhancement for a prior conviction only once to increase the aggregate term, and not separately to increase the principal or subordinate term imposed for each new offense." (*Williams*, *supra*, 34 Cal.4th at p. 400 citing *Tassell*, *supra*, 36 Cal.3d at p. 201.) The Supreme Court went on to clarify that "Section 1170.1, however, applies only to *determinate* sentences. It does not apply to

multiple indeterminate sentence imposed under the Three Strikes law." (*Williams, supra,* at p. 402.)

In a case where a defendant receives an indeterminate sentence under the Three Strikes law, i.e., in third strike cases, the Supreme Court reasoned that it is "not inconsistent" with the spirit of the Three Strikes law—namely to increase punishment for recidivist offenders—for a trial court to impose enhancements under section 667(a)(1) on every count of which the defendant is convicted. (*Williams, supra,* 34 Cal.4th at p. 404 citing *People v. Jones* (1993) 5 Cal.4th 1142, 1147.) Doing so is also consistent with the logic of the Three Strikes law, which uses a "defendant's status as a recidivist to *separately* increase the punishment for *each* new felony conviction." (*Williams, supra,* at p. 404.) The Supreme Court summed up its holding as follows: "The Three Strikes law, unlike section 1170.1, does not draw any distinction between status enhancements, based on the defendant's record, and enhancements based on the circumstances of the current offenses, and the Three Strikes law generally discloses an intent to use the fact of recidivism to separately increase the sentence imposed for each new offense. Accordingly, we conclude that, under the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence." (*Id.* at pp. 405–406.)

In *Misa, supra,* 140 Cal.App.4th 837, the Court of Appeal considered the applicability of *Tassell* and *Williams* to a sentence imposed on a second strike offender facing an indeterminate life sentence. In *Misa,* a jury convicted the defendant Misa of one count of torture and two counts of assault with a deadly weapon by means of force likely to cause great bodily injury. (*Misa, supra,* at p. 840.) The trial court sentenced Misa to an indeterminate life sentence on the torture count,[15] a determinate term on one assault count, and stayed punishment on the second assault count. Additionally, the trial court imposed separate five-year enhancements under section 667, subdivision (a)(1) on

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15 "Torture is punishable by imprisonment in the state prison for a term of life." (§ 206.1.)

the torture count and the assault count for Misa's prior serious felony conviction. (*Misa, supra,* at p. 841.)

On appeal, Misa contended that under *Tassell*, the trial court erred in imposing the prior conviction enhancement twice, once on the determinate term imposed on the assault count and again on the indeterminate term imposed on the torture count. The Court of Appeal rejected Misa's argument, holding that "*Tassell* is inapplicable to indeterminate sentences where the defendant is subject to the 'Three Strikes law.'" (*Misa, supra,* 140 Cal.App.4th at p. 845.) The appellate court reasoned that even though *Williams* dealt with the issue of multiple prior enhancements on a third strike offender, "a logical application of the *Williams* analysis in this context [a second strike offender with an indeterminate sentence] would require the imposition of the prior conviction enhancement on Misa's second strike offense (the torture count) notwithstanding that the enhancement was also imposed as a status enhancement relating to the determinate term on the assault count." (*Misa, supra,* at p. 846.)

Without any discussion of the facts of *Misa*, the Attorney General argues: "*Misa* held that *Tassell* did not apply to second strike sentencing in light of *Williams*." Thus, the Attorney General argues that the trial court did not err by imposing separate five-year enhancements under section 667(a)(1) for each count of which appellant was convicted in this case.

The Attorney General's position ignores a critical distinction between the defendants in *Williams* and *Misa*, and appellant in this case. In *Williams* and *Misa*, the defendants faced *indeterminate* sentences, in the former case because the defendant was a third striker and in the latter case because the defendant committed an offense that carried an indeterminate sentence as punishment. In the present case appellant received *determinate* sentences on each count of which he was convicted. Even though the punishment for each count was doubled because of appellant's second strike status, appellant's total sentence was nonetheless calculated under section 1170.1, which "generally governs the calculation and imposition of a determinate sentence when a

defendant has been convicted of more than one felony offense." (*Williams*, *supra*, 34 Cal.4th at p. 402.) In other words, appellant does not fall within the framework crafted by *Williams* and *Misa* because he received a determinate sentence on each count. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560 ["As can be noted, *Williams* and *Misa* hold that in case where multiple *indeterminate* terms are imposed, all section 667, subdivision (a) five-year serious felony enhancements must be imposed on every count" (italics added)].) Appellant's sentence is controlled by *Tassell*, and under *Tassell*, the trial court should have imposed a five-year sentence under section 667(a)(1) for his prior serious felony conviction only once to his aggregate sentence.

DISPOSITION

The convictions are affirmed. The sentence is vacated and the matter is remanded for resentencing consistent with this decision.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ